IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 359

LEANDER H. PEREZ, JR., *Petitioner,*

v.

GARY DUNCAN, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

ALVIN J. BRONSTEIN
GEORGE M. STRICKLER, JR.
1110 Royal Street
New Orleans, Louisiana 70116

RICHARD B. SOBOL
1823 Jefferson Place, N. W.
Washington, D. C. 20036

ANTHONY G. AMSTERDAM
Stanford Law School
Stanford, California 94305

Attorneys for Respondent

October 8, 1971

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	1
Question Presented	2
Statement	2
Argument	6
Conclusion	8

TABLE OF AUTHORITIES

CASES:

Commissioner v. Duberstein, 363 U.S. 278 (1960)	7
Duncan v. Louisiana, 391 U.S. 145 (1968)	3
Dyson v. Stein, 401 U.S. 200 (1971)	6
Plaquemines Parish School Board v. United States, 415 F. 2d 817 (5th Cir. 1969)	2
Rudolph v. United States, 370 U.S. 269 (1962)	7
Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968)	4
United States v. McLeod, 385 F. 2d 734 (5th Cir. 1967)	6
United States v. Wood, 295 F. 2d 772 (5th Cir. 1961)	6
Younger v. Harris, 401 U.S. 37	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 359

LEANDER H. PEREZ, JR., *Petitioner*,

v.

GARY DUNCAN, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 445 F.2d 557. The opinion of the United States District Court for the Eastern District of Louisiana is reported at 321 F. Supp. 181. The opinions are reprinted in the Appendices to the Petition for Certiorari.

QUESTION PRESENTED

The District Court, specifically applying the test articulated by this Court last term in *Younger* v. *Harris,* enjoined a state criminal prosecution pending against respondent on the ground that it was maintained maliciously and in bad faith, for the purposes of deterring the exercise of equal civil rights by black citizens of Plaquemines Parish. The only question presented for review by the petition for certiorari is whether the district court's findings, unanimously affirmed by the court of appeals, are clearly erroneous.

STATEMENT

Respondent relies on the district court's detailed statement of the facts—which appears in Appendix A to the Petition for Certiorari, pp. 22-28.[1] These facts are briefly summarized here.

This case arose in the fall of 1966, at the height of the tension caused by the open resistance of the petitioner—the District Attorney of Plaquemines Parish—and other public officials to the court-ordered integration of the public schools.[2] At that time, respondent Gary Duncan, a Negro, was arrested on the allegation that he slapped a white youth on the arm after breaking up a potentially violent confrontation

[1] In his statement of the case, petitioner purports to set forth the "evidentiary facts found by the trial judge and set forth in the opinion of the court of appeals" (Petition, p. 5), but in fact departs completely from the facts as stated by either court. See Appendix A and Appendix B to the Petition, pp. 22-28, 33-36.

[2] In *Plaquemines Parish School Board* v. *United States,* 415 F.2d 817, 835, n. 29 (5th Cir. 1969), the court of appeals described the "official attempts to destroy [the] public school system and to flout the mandates of the United States Constitution as interpreted by the federal courts."

between four white boys and two young cousins of the respondent outside the then recently integrated Boothville-Venice school. In January, 1967, respondent was convicted of simple battery and sentenced to two months in prison and a $150 fine. The conviction was later reversed by this Court on the ground that respondent had been denied his federally secured right to trial by jury. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). The federal injunctive suit was filed following this Court's remand. The district court enjoined the retrial, and the court of appeals unanimously affirmed.

The district court issued its injunction only upon carefully supported findings that "the proceeding against Duncan in state court is maintained by the defendant in bad faith and for purposes of harassment; . . . [that] there is no legitimate state interest in the reprosecution of Duncan; . . . [that] the reprosecution of Duncan would deter and suppress the exercise of federally secured rights by Negroes in Plaquemines Parish . . . [and that] the destructive effect on the exercise of federal rights could not be corrected by Duncan's possible subsequent success in state or federal court." Appendix A to Petition, pp. 28-30.

The court based its conclusions as to the purposes of the prosecution on the following actions of the petitioner and other parish officials with whom he acted in concert:

First, that in connection with the maintenance of this simple proceeding, the respondent was, without adequate cause, arrested on four separate occasions. On the last occasion, respondent was seized from his home in the middle of the night and ridiculed, frightened and insulted (Appendix A to Petition, pp. 22-27);

Second, that the petitioner caused the arrest of respondent's attorney, Richard B. Sobol, on a baseless charge of unauthorized practice of law (Appendix A to Petition, p. 26). In a related earlier proceeding, of which the lower courts here took notice, a three-judge district court, in enjoining the prosecution of Sobol, found that:

> "This prosecution was meant to show Sobol that civil rights lawyers were not welcome in the parish, and that their defense of Negroes involved in cases growing out of civil rights efforts would not be tolerated. It was meant also as a warning to other civil rights lawyers and to Negroes in the parish who might consider retaining civil rights lawyers to advance their rights to equal opportunity and equal treatment under the Equal Protection Clause of the Fourteenth Amendment."

Sobol v. *Perez,* 289 F. Supp. 392, 402 (E.D. La. 1968);[3]

Third, that the bond imposed against the respondent in connection with the battery charge was double the figure usually imposed by the state district court in simple battery cases (appendix A to Petition, p.24);

Fourth, that the sentence of two months in prison and $150 fine imposed on the respondent was far in excess of the sentence typically imposed by the state court in simple battery cases over the preceding five years. On deposition, the state trial judge specifically stated that the basis for the high sentence was respondent's representation by a civil rights lawyer, the association of the case with the integration of the parish school system and respondent's challenge to the constitutionality of the Louisiana jury trial provision (Appendix A to Petition, p. 25);

---

[3] The *Sobol* case was not appealed.

Fifth, that after the fourth and last arrest of the respondent, local authorities, in direct violation of Louisiana law, refused to release respondent unless a bond *double* to the amount set by the state court was posted (Appendix A to Petition, p. 27);

Lastly, the court relied on statements of petitioner and the district court judge that specifically express hostility against the respondent and against his retention of attorneys active in the defense of civil rights cases (Appendix A to Petition, p. 25).

In finding that there was no legitimate state interest in the reprosecution, the district court stated that:

> "Without attempting to resolve the disputed issue of whether Duncan slapped or simply touched the white youth on the arm, it is clear beyond dispute that any violation that may have occurred was so slight and technical as to be generally reserved for law school hypotheticals rather than criminal prosecutions. The white boy was not hurt and displayed no bruise minutes after the incident. *De minimus* 'batteries' of this kind occur repeatedly in Plaquemines Parish and elsewhere and do not become the subject of criminal proceedings."

Appendix A to the Petition, p. 29.

The court also concluded that, because of the widespread publicity within the Parish occasioned by the prosecutions of Duncan and Sobol, the reprosecution of Duncan would "deter and suppress the exercise of federally secured rights by Negroes in Plaquemines Parish. . . . If Duncan were required to face retrial, it would constitute an unmistakable message to Negroes in Plaquemines Parish that it is unprofitable to step outside familiar patterns and to seek to rely on fed-

eral rights to oppose the policies of certain Parish officials." (Appendix A to Petition, pp. 29-30). It was on this basis that the court made its finding of irreparable injury.

ARGUMENT

Last term, in *Younger* v. *Harris*, 401 U.S. 37, this Court articulated the standards governing the issuance of federal injunctions against state criminal prosecutions. The Court held that federal courts may not enjoin state court prosecutions simply upon a showing that the statute under which the prosecution is initiated is constitutionally invalid, but expressly recognized the discretion of the district courts to grant injunctive relief against a state criminal prosecution where there is a "showing of bad faith or harassment . . ." in the maintenance of the prosecution. 401 U.S. at 50; see also *id.* at 48-49, 53-54. See also *id.* at 56 (injunctive relief is proper "if there has been bad faith and harassment—official lawlessness . . .") (Stewart, J., concurring); *id.* at 56 (plaintiff did "not allege that the prosecution was brought in bad faith to harass him.") (Brennan, J., concurring in the result). See also *Dyson* v. *Stein*, 401 U.S. 200 (1971). There is no suggestion in the Court's opinion that this rule is limited to cases in which the prosecution infringes upon First Amendment rights, as distinct from other federally secured rights, and the availability of federal injunctions against bad faith prosecutions has never been so limited. See, *e.g.*, *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967); *United States* v. *Wood*, 295 F.2d 772 (5th Cir. 1961).

As the Court of Appeals in this case noted, "the district judge accurately forecast by his opinion the

criteria which the Supreme Court established in *Younger* v. *Harris,* for the grant of federal injunctive relief against state prosecutions." And the court of appeals examined and affirmed the district court's factual findings that the prosecution against Duncan is maintained in bad faith and for purposes of harassment, that there is no legitimate state interest in the prosecution and that the mere fact of prosecution will cause irreparable injury to federally secured rights.[4]

As both of the lower courts plainly applied the *Younger* standard to the decision of this case, the only question that is presented by this petition for certiorari—notwithstanding petitioner's several variations on the theme—is whether this Court should review the findings of fact below. Although the petitioner argues that findings concerning motive are "ultimate facts" not governed by the clearly erroneous rule, the decisions of this Court are plainly to the contrary. *Commissioner* v. *Duberstein,* 363 U.S. 278, 289-291 (1960); *Rudolph* v. *United States,* 370 U.S. 269 (1962). In any event, review of factual findings in a case decided in strict accordance with applicable legal principles is an inappropriate subject of this Court's certiorari jurisdiction. See *Rudolph* v. *United States, supra.*

---

[4] Petitioner has argued that the court of appeals held that where bad faith is shown "irreparable injury is not needed." (Petition, p. 12). But, as the Court of Appeals noted, the district judge specifically found that the retrial of Duncan "will cause irreparable injury to the exercise of federally secured rights by Negro residents of Plaquemines Parish." (Appendix B to Petition, p. 37)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ALVIN J. BRONSTEIN
GEORGE M. STRICKLER, JR.
1110 Royal Street
New Orleans, Louisiana 70116

RICHARD B. SOBOL
1823 Jefferson Place, N. W.
Washington, D. C. 20036

ANTHONY G. AMSTERDAM
Stanford Law School
Stanford, California 94305

Attorneys for Respondent

October 8, 1971